Supreme Court, U.S.
FILED

No. 92-785

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP, PETITIONER

v.

STATE WATER RESOURCES CONTROL BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 42 U.S.C. 1988 authorizes the recovery of attorney's fees incurred in administrative proceedings that are not a part of the process of enforcement of a civil rights statute and do not contribute to any relief obtained in the district court action.

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This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States in this case.

STATEMENT

1. Petitioner operates a hydroelectric facility on Rock Creek in California. In April 1983, the Federal Energy Regulatory Commission (FERC) issued a license requiring petitioner to allow certain minimum amounts of water to flow past the project (ranging from 11 cubic feet per second during the summer to 15 cubic feet per second during the winter). In February 1984, the respondent California State Water Resources Control Board issued a permit for the project with interim flows duplicating

those required by FERC. When the Board held hearings in 1986 to consider whether it should impose higher minimum flows than those required by the FERC license, petitioner sought an order from FERC declaring that FERC had the exclusive authority to impose flow requirements on the project. In March 1987, FERC issued such an order, stating that the Board has no authority to set minimum flows for the project greater than those required by the license FERC had issued. A few days later, the Board issued an order setting minimum flow conditions ranging from 30 cubic feet per second to 60 cubic feet per second, much higher than those established in the FERC license. See Pet. App. 2a-3a; Pet. 3.

At that point, the State of California intervened in the FERC proceedings on behalf of the Board, challenging FERC's authority to issue the declaratory order. See Pet. App. 3a. After further proceedings, FERC rejected California's position. In 1989, the Ninth Circuit affirmed FERC's order in *California* v. *FERC*, 877 F.2d 743, 750. This Court granted California's petition for a writ of certiorari and subsequently affirmed unanimously. See *California* v. *FERC*, 495 U.S. 490 (1990).

2. Petitioner also attempted to litigate its dispute with the Board in the United States District Court for the Eastern District of California. When the Board responded to FERC's first order by issuing its order setting minimum flow conditions inconsistent with those established by FERC, petitioner filed this action under 42 U.S.C. 1983. The complaint sought a temporary restraining order and a preliminary injunction against enforcement of the order, as well

as attorney's fees pursuant to 42 U.S.C. 1988. See Pet. App. 3a.

When the Board voluntarily agreed to refrain from enforcing its order pending a hearing on the preliminary injunction, petitioner withdrew its request for a temporary restraining order. Similarly, when the Board subsequently agreed to refrain from enforcing its order until the completion of the proceedings in *California* v. *FERC*, *supra*, the district court stayed the Section 1983 case pending resolution of those proceedings. After this Court ruled in favor of FERC, the Board granted permits conforming to the flow levels approved by FERC. The district court then granted the Board's motion to dismiss the Section 1983 action, retaining jurisdiction only to consider petitioner's motion for attorney's fees. See Pet. App. 3a-5a.

After briefing and a hearing, the district court court noted that 42 U.S.C. 1988 authorizes an award of fees only to a "prevailing party" and reasoned that petitioner was not a prevailing party because there was "no causal link" between the Section 1983 litigation and the relief petitioner obtained in the *California* v. *FERC* case. Pet. App. 14a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-12a. With respect to the request for fees incurred in the Section 1983 case, the court held that petitioner could be regarded as a prevailing party, because pressure from that lawsuit caused the Board to alter its conduct sufficiently to obviate petitioner's need for a preliminary injunction. Accordingly, the court of appeals remanded the case to the district court for further consideration of petitioner's motion for attorney's

fees related to the Section 1983 proceeding. Pet. 10a-12a.

With respect to the claim for fees incurred in the FERC proceeding, however, the court affirmed. Pet. App. 6a-10a. The court agreed with the district court that petitioner was not entitled to attorney's fees for costs incurred in the FERC proceeding, and the subsequent appeals of that proceeding to the Ninth Circuit and this Court, because the relief available from FERC was "independent" from the relief available under Section 1983 in the district court. *Id.* at 9a. The court explained that petitioner's "approach to FERC was [neither] a condition precedent to its entry to federal court * * * [nor] part of a continuing federal court action." *Ibid.* Thus, the court agreed with the district court that fees could not be awarded for the FERC proceeding because of "the lack of causal connection" between the Section 1983 case and the relief obtained from FERC and the Supreme Court. *Id.* at 10a.

DISCUSSION

1. Under 42 U.S.C. 1988, district courts have discretion, in "any action or proceeding to enforce [certain listed provisions of Title 42]," to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." To obtain the fees sought here, petitioner must establish that the fees it seeks were incurred in an "action or proceeding to enforce" 42 U.S.C. 1983 (the listed provision of Title 42 on which petitioner relied in this case).[1]

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[1] As respondent points out (Br. in Opp. 8-10), it is questionable whether petitioner—who did not obtain any relief

a. Because the proceedings before FERC (including the subsequent judicial review of those proceedings) did not constitute an action to enforce Section 1983, fees incurred in those proceedings are directly compensable only if those proceedings were so closely related to the Section 1983 action that they may be

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from the district court—satisfied the threshold requirement that it be a "prevailing party." Of course, it is possible in some cases to be a prevailing party without obtaining any relief from the court. See *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987). To secure such a ruling, however, the plaintiff must show that the civil rights lawsuit caused the defendant to take the action sought by the plaintiff; the plaintiff is not a prevailing party if the defendant takes the action for reasons independent of the lawsuit. See *id.* at 760 (lawsuit must "produc[e]" the relief); *id.* at 761 (plaintiff prevails only if "the defendant, under pressure of the lawsuit, alters his conduct"); see also *id.* at 763 (plaintiff's contention that the lawsuit "prompted" the defendant to change its conduct). In this case, both of the lower courts found that this lawsuit did not cause the relief petitioner obtained in the FERC proceedings. Pet. App. 10a, 14a.

The court of appeals did find, however, that the civil rights lawsuit caused respondents to alter their conduct temporarily, obviating the need for petitioner to secure a temporary restraining order or preliminary injunction. In the circumstances of this case, we doubt that respondent's temporary forbearance constitutes sufficient success "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit," *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983), and thus is not sufficient to render petitioner a prevailing party. Resolution of that question, however, is not necessary to the decision of the case, because, as we discuss below, the fees petitioner seeks in connection with the FERC proceeding were not incurred in a "proceeding to enforce [Section 1983]" and thus would not be compensable even if petitioner were considered a "prevailing party" in the Section 1983 action.

considered part of that action. This Court's decisions make such a conclusion untenable on the facts of this case.

In *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), this Court considered for the first time the propriety under a fee-shifting statute of awarding compensation in a district court action for fees incurred in related administrative proceedings. In that case, the Court held that fees were available in an action under Title VII of the Civil Rights Act of 1964 for costs incurred in the portion of the proceedings that took place before a state administrative agency.[2] 447 U.S. at 60-71. The Court relied heavily on the structure of Title VII, under which claimants are required to present their claims to state administrative agencies; the court reasoned that denial of fees "would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim." 447 U.S. at 63; see also *id.* at 65 ("Initial resort to state and local remedies is mandated.").

The Court's subsequent decision in *Webb* v. *County Board of Education*, 471 U.S. 234 (1985), made

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[2] *Carey* involved Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), but the Court subsequently has suggested that its analysis of that provision was applicable to Section 1988 as well. See, *e.g.*, *Webb* v. *County Board of Education*, 471 U.S. 234, 240 (1985); *North Carolina Department of Transportation* v. *Crest Street Community Council, Inc.*, 479 U.S. 6, 15 (1986). Even though the fee-shifting provision in Section 706 of Title VII resembles Section 1988, the differences between the underlying Title VII action and actions under 42 U.S.C. 1983 make the availability of fees in the two situations quite different, as this Court's decision in *Webb* makes clear.

clear that *Carey* did not establish a broad rule requiring fee awards for all types of administrative proceedings. The plaintiff in *Webb* contended that his employment as a school teacher had been terminated for racial reasons. After unsuccessfully challenging his termination before the responsible state agency, Webb filed suit in district court seeking relief under various civil rights statutes. When he obtained relief in the district court, he relied on *Carey* to support his claim for compensation under 42 U.S.C. 1988 for the attorney's fees incurred in the state administrative proceedings. The Court rejected that claim, explaining that

> *Carey* * * * arose under a statute that expressly requires the claimant to pursue available state remedies before commencing proceedings in a federal forum. There is no comparable requirement in § 1983, and therefore the reasoning in *Carey* is not applicable to this case. * * * Because § 1983 stands "as an independent avenue of relief" and petitioner "could go straight to court to assert it," the School Board proceedings in this case simply do not have the same integral function under § 1983 that state administrative proceedings have under Title VII.

471 U.S. at 240-241 (footnote and citation omitted) (quoting *Smith* v. *Robinson*, 468 U.S. 992, 1011 n.14 (1984)); see *North Carolina Department of Transportation* v. *Crest Street Community Council, Inc.*, 479 U.S. 6, 15 (1986) (explaining *Carey* as authorizing fees "for time spent on administrative proceedings to enforce the civil rights claim"). Because the administrative proceedings at issue here were not proceedings "to enforce" petitioner's civil rights claim, petitioner was not entitled to compensation for the fees petitioner incurred in those proceedings.

b. To be sure, there are some circumstances in which administrative proceedings that are not themselves proceedings "to enforce" a civil rights claim will produce results that are of sufficient use in the district court action to justify including compensation for those fees as part of the reasonable fees for the district court action. As the Court explained in *Webb*, a court may award fees for "any discrete portion of the work product from the administrative proceedings * * * that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement." 471 U.S. at 243; see *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986) (same); *Crest Street*, 479 U.S. at 15 (same); *Sullivan* v. *Hudson*, 490 U.S. 877, 889 (1989) (same). That rule reflects the fact that the reasonable attorney's fee allowed under Section 1988 compensates not only for time spent in court, but also for time spent in preparing applicable pleadings, investigating the background of the case, and similar matters that contribute significantly to whatever success the plaintiff obtains in the district court action. It would be anomalous to compensate such costs generally, but to bar compensation if the costs are incurred in the first instance in some other proceeding.

Under that principle, petitioner is not entitled to compensation for the FERC proceedings, because those proceedings were not a necessary or useful predicate to relief in the Section 1983 action. To use this Court's language, none of the work done in the administrative proceeding was "useful * * * to advance the civil rights litigation to the stage it

reached before settlement," *Webb*, 471 U.S. at 243; indeed, the civil rights litigation never advanced to a stage where the work done in the administrative proceedings was useful in the district court action in any way. Compare *Delaware Valley*, 478 U.S. at 558-561 (appropriate to compensate for costs incurred in administrative proceedings designed to protect the efficacy of relief that was obtained from the district court); *Hudson*, 490 U.S. at 888-892 (appropriate to compensate for costs incurred in administrative proceedings "necessary to the completion of a civil action" in which the claimant secured relief).

Petitioner's claim is substantially broader than the claims made in any of this Court's attorney's fee cases. Petitioner's claim is not that the FERC proceedings aided it in obtaining or protecting some type of relief in the district court; petitioner obtained *no* relief from the district court. Rather, petitioner seeks fees for all reasonable costs incurred in the FERC proceedings because petitioner obtained *in those proceedings* the relief that it might have obtained in the Section 1983 case if it had pursued the Section 1983 case as the vehicle for seeking a ruling on FERC's exclusive authority to impose flow requirements. Neither this Court's cases nor the language of Section 1988 supports that claim.

2. Petitioner also argues (Pet. 15-20) that plenary review is appropriate to resolve a conflict between the decision in this case and decisions of the First, Third, and Seventh Circuits. We do not agree; the decisions on which petitioner relies do not establish a conflict warranting review by this Court. In the first place, all four of the opinions on which petitioner relies were decided before this Court's decision in *Webb*, which clarified the relevant principles.

In any event, none of the decisions suggests that any court would have decided this case any differently even before *Webb*.

a. Two of the decisions on which petitioner relies (Pet. 17-18) involved situations that resemble *Carey*, in which it was necessary for the claimants to participate in the other proceedings in order to protect their right to relief in the district court action. *See Lampher* v. *Zagel*, 755 F.2d 99, 102-104 (7th Cir. 1985) (appropriate to award fees incurred in state court proceeding that determined legal question at issue in federal case, where federal district court abstained pending resolution of the state court proceeding); *Stathos* v. *Bowden*, 728 F.2d 15, 22 (1st Cir. 1984) (appropriate to award fees incurred in state court proceeding filed by defendants in federal action "in order to preempt the federal action," where federal court determined that "plaintiffs were forced to defend [the state court action] lest they lose their § 1983 claim in the federal courts through collateral estoppel"). Although it is not clear that *Carey* required an award of fees in those cases—the state court proceedings were not "proceedings to enforce" Section 1983—the Ninth Circuit's discussion in this case (Pet. App. 8a-9a) of its earlier decision in *Bartholomew* v. *Watson*, 665 F.2d 910 F.2d (1982), on which both of those courts relied (see *Lampher*, 755 F.2d at 103-104; *Stathos*, 728 F.2d at 22), suggests that there is no reason to believe that those courts would have been any more likely to grant relief in this case than the Ninth Circuit.

b. The third case, like this Court's decision in *Delaware Valley*, involved an award of fees for work performed in administrative proceedings that

materially contributed to the plaintiff's success in securing effective relief from the district court. See *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760, 766-767 (7th Cir. 1982) (appropriate to award fees incurred in plaintiffs' attempt to have defendant debarred from government contracts where defendant agreed to settlement in Title VII action to forestall possible debarment), cert. denied, 461 U.S. 956 (1983). That case is clearly distinguishable from this case, where the administrative proceeding played no role in the obtaining of relief in the district court action.

c. The fourth case on which petitioner relies (Pet. 18), *Sullivan* v. *Pennsylvania Department of Labor and Industry*, 663 F.2d 443 (3d Cir. 1981), cert. denied, 455 U.S. 1020 (1982), is similarly unhelpful to petitioner. In that case, the court awarded fees to a plaintiff who secured relief in an arbitration that she had sought in a Title VII lawsuit arising out of the same incident. 663 F.2d at 451-452. The issue in the case, however, was whether the plaintiff was a prevailing party for purposes of the fee-shifting provision in Title VII even though she obtained no relief in the Title VII litigation. The court concluded that she should be treated as a prevailing party in the Title VII litigation because that litigation was a substantial cause of her success in obtaining the relief she sought in her Title VII complaint, even though she obtained that relief through an arbitration award rather than in the Title VII proceeding itself. See *id.* at 450 ("the crucial question * * * is not whether a plaintiff *actually* prevailed in a * * * civil rights lawsuit, but whether the plaintiff may be deemed to have prevailed in the civil rights action because of the causal connection between the suit

filed and the relief obtained"); see also *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987). Both of the lower courts in this case found that petitioner could not prevail under such a theory here, because there was no causal connection between the filing of the Section 1983 action and the relief petitioner obtained in the FERC proceeding. Pet. App. 10a, 14a.

In any event, *Pennsylvania Department of Labor* does not support petitioner's argument in this case. Although the claimant in that case obtained complete relief through arbitration, the work for which fees were sought was limited to the "work done in connection with the EEOC proceedings and the Title VII litigation in federal court, not [the] work done in connection with the arbitration itself." 663 F.2d at 447. Accordingly, that decision—which, given the view that the plaintiff was a prevailing party, follows directly from *Carey*—does not benefit petitioner, which seeks compensation not for the fees incurred in the Section 1983 action, but for the fees incurred in the FERC proceedings.

d. Finally, petitioner contends (Pet. 19) that a "hopeless conflict" has arisen among Eighth Circuit rulings on the compensability of fees incurred in administrative proceedings. An intracircuit conflict, of course, is not a sufficient basis for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, petitioner's contention is overstated. Each of the three Eighth Circuit decisions petitioner cites as having awarded fees relied on the standard articulated in *Webb* to justify a fee award for administrative proceedings that contributed substantially to relief that the plaintiffs ob-

tained from the district court.[3] Because there was no causal connection in this case between the administrative proceedings and any relief obtained from the district court, the reasoning of those decisions would not support an award of the fees petitioner seeks in this case.

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[3] See *Bobbitt* v. *Paramount Cap Manufacturing Company*, 942 F.2d 512, 514 (1991) (plaintiff who secured a $15,000 settlement of her Title VII claim received award for fees incurred in state unemployment benefits proceeding where the work was " 'useful and substituted for work at the judicial stage that would have been ordinarily necessary to a successful outcome' of Bobbitt's civil rights claim"); *McDonald* v. *Armontrout*, 860 F.2d 1456, 1462 (1988) (plaintiffs who prevailed in a Section 1983 action challenging prison conditions compensated under Section 1988 for investigative work performed during a previous habeas corpus proceeding, because the work "obviated the need for comparable work in" litigation challenging the constitutionality of prison conditions and "contributed directly to [its] successful outcome" (brackets in original)); *Jenkins* v. *Missouri*, 862 F.2d 677 (1988) (prevailing parties in school desegregation case awarded fees for work in school district tax levy elections because remedy granted by district court was contingent on passage of tax increases).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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